IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA
CIVIL DIVISION

VICTORY GARDENS, INC.	:	No. 2017-03792
v.	:	
WARRINGTON TOWNSHIP ZONING HEARING BOARD and WARRINGTON TOWNSHIP	:	Land Use Appeal

OPINION and ORDER

Victory Gardens, Inc. ("Victory Gardens") has appealed from the Decision of the Warrington Township Zoning Hearing Board (the "Zoning Hearing Board") wherein the Zoning Hearing Board denied Victory Gardens appeal from the Notice of Violation issued on March 9, 2015 with regard to the mulching operation being conducted by Victory Gardens on Winding Brook Farm and wherein the Zoning Hearing Board determined (1) that Victory Gardens' mulching operation is not a permitted use in an RA Residential Agricultural District under Section 402 of the Warrington Township Zoning Ordinance (the "Zoning Ordinance"); (2) that Victory Gardens' mulching operation is not a continuation or expansion of a valid nonconforming use; (3) that Victory Gardens did not meet its burden of proof with regard to a use variance; and (4) that Victory Gardens did not meet its burden of proof with regard to its request for equitable relief under the theories of vested right, equitable estoppel or variance by estoppel. For the reasons set forth below, the Decision of the Zoning Hearing Board is affirmed.

The Property

Winding Brook Farm is a 216-acre farm located at 3014 Bristol Road in Warrington Township, Bucks County. *Decision, "Background" 3.* The farm is a working farm which

produces crops and houses livestock. *Decision, Background 12, 13, F.F. 276.* It is owned by The William and Rosemary Garges Real Estate Trust (the "Property Owner"). *Decision, p. 1.* It is managed by Lori Myers and her brother. *Decision, F.F. 276.*

Since 1999, Victory Gardens has leased a portion of Winding Brook Farm to conduct a mulching operation (the "Leased Property"). *Decision, Background 5.* The size and nature of Victory Gardens' operation has changed substantially over the years. Under the terms of the original lease agreement, Victory Gardens leased two acres of the farm. *Exhibit A-23.* Michael Kelly, a nearby property owner, testified that in 2001, there was only one small pile of mulch on the Leased Property estimated to be six or seven feet high. *Decision, F.F. 190, 192; N.T. at 1037, 1040.* Victory Gardens' operation now encompasses 11.7 acres.[1] *Decision, F.F. 262; N.T. at 1371.* Victory Gardens processes approximately 125,000 yards of mulch at the Leased Property each year. *Decision, F.F. 88; N.T. at 906.* The operation produces a wide variety of mulch, including triple ground hardwood mulch, double ground mulch, black-dyed mulch, brown-dyed mulch, red-dyed mulch, blue-dyed mulch, yellow-dyed mulch and playground-certified mulch. *Decision, F.F 93; N.T. at 120.* There are between 8 and 10 mulch piles on the Leased Property. *Decision, F.F. 102; N.T. at 241.* In 2013, the Pennsylvania Department of Environmental Protection ("DEP") reported that the mulch piles on the Leased Property were between 60 and 70 feet high. *Decision, F.F. 103, 273; Exhibit P-19; N.T. at 244.* In March of 2014, DEP again reported mulch pile heights of 60 feet. *Decision, F.F. 107, 110, 274; Exhibit P-21; N.T. at 250, 256.* Mulch piles in excess of 25 feet in height, 150 feet in width, and 250 feet long were also observed on the property. *Decision, F.F. 89; N.T. p. 20.*

[1] Michael Butler, the owner and President of Victory Gardens, testified that he currently leases eight acres. N.T. at 53. However, the Zoning Hearing Board chose to accept the testimony of Thomas Comitta that the operation actually encompasses 11.7 acres. *Decision, F.F. 262; N.T. at 1371.*

The raw material used to make the mulch is brought to the Leased Property from various municipalities, contractors and private individuals. Multiple grinders are used to process the raw material. The ground material is then dyed. *N.T. at 123, 895.* Victory Gardens does not use any mulch for its own agricultural purposes. All of the mulch produced is sold for use off-site. *Decision, F.F. 128; N.T. at 376.* Victory Gardens delivers to customers in various locations, including New York, Connecticut, Virginia and Delaware. *Decision, F.F. 94; N.T. at 122.* Transportation of the raw materials to the property, processing of the raw material and delivery of the finished product involves the use of a large variety of heavy equipment including grinders, dying machines, dump trucks, heavy front-end loaders, bulldozers, wheel loaders and tractor trailers. *Decision, F.F. 47 (adopted by the controlling decision in F.F. 87), 117, 166, 213, 218; N.T. at 21, 93-110, 270, 934, 1152).*

Prior to 2011, the official hours of operation were between 6:00 a.m. to 9:00 p.m. In 2012 the official hours of operation changed to 6:00 a.m. to 8:00 p.m. *Decision, F.F. 41 (adopted by the controlling decision in F.F. 87).* However, John McConnell, a nearby property owner testified that grinding operations are conducted fourteen hours a day, six days a week. *Decision, F.F. 207; N.T. at 1096.* Other local residents testified that Victory Gardens' mulching operations generates extremely heavy truck traffic six days a week beginning as early as 5:30 a.m. and continuing until 9 p.m.[2] Trucks were also observed entering the property on Sundays. *Decision, F.F. 212; N.T. at 1101.*

[2] Michael Kelly testified that the amount of trucks and equipment utilized in connection with Victory Gardens' mulching operations increased drastically in 2001 and 2002. He testified that Victory Gardens trucks were making approximately 100 trips per day using the Pickertown Road entrance/exit. *Decision, F.F. 193; N.T. at 1041, 1046.* Frank Ace, owner of an adjacent property, counted 75 trucks entering the Victory Gardens entrance on Folly Road in one day. *Decision, F.F. 155, 170; N.T. at 923-925, 936.* Theresa Paone, a nearby property owner, testified that she noticed a substantial increase in the Victory Gardens truck traffic in the winter of 2013-2014. *Decision, F.F. 175, 177; N.T. at 995.* The trucks can be heard passing her home Monday through Saturday beginning as early as 5:30 a.m. *Decision, F.F. 178, 179; N.T. at 996.* On May 19, 2014, Ms. Paone kept a log of the truck traffic. On that date 72 Victory Gardens trucks passed her home. *Decision, F.F. 179; N.T. at 999, 1002.* On May 22, 2014, Ms. Paone

Procedural History

As early as 2002, Warrington Township (the "Township") began to receive complaints regarding the increase in truck traffic to and from the Leased Premises. *Decision, F.F. 63 (adopted by the controlling decision in F.F. 87).* In 2012, Victory Gardens met with the Township to discuss its hours of operation and truck traffic. *Decision, F.F. 59 (adopted by the controlling decision in F.F. 87).* Those meetings resulted in Victory Gardens and the Township entering into a "Memorandum of Understanding" which was adopted by the Warrington Township Board of Supervisors on March 21, 2012. *Decision, F.F. 60-61 (adopted by the controlling decision in F.F. 87); Exhibits A-18, A-17B.* The Memorandum of Understanding addressed the hours trucks would operate, the entrances they would use, measures to be taken to increase visibility and traffic safety, the use of "Jake Brakes" and instruction of drivers to "drive in a responsible and courteous manner." *Exhibit A-18.* On August 6, 2012, the Township Manager sent a Notice of Violation to Victory Gardens' owner and president, Michael Butler, advising him that Victory Gardens was in violation of the Memorandum of Understanding. *Decision, F.F. 112; Exhibit P-23; N.T. at 258.* A second notice with regard to these violations was sent on August 15, 2012. *Decision, F.F. 114; Exhibit P-24; N.T. at 263.* A third notice was sent on September 18, 2012. *Decision, F.F. 115; Exhibit P-26.*

On January 7, 2012, the Township notified Victory Gardens of Fire Code and Maintenance Code violations, noting that mulch fires had occurred on the property on March 25, 2011,

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counted 89 Victory Gardens trucks on Bristol and Folly Roads between 6 a.m. and 5:37 p.m. *Decision, F.F. 181; Exhibit P-60; N.T. at 1005.* On May 23, 2014, she counted 118 Victory Gardens trucks on Bristol and Folly Roads between 6:17 a.m. and 6:17 p.m. *Decision, F.F. 182; Exhibit P-61; N.T. at 1005.* On May 24, 2014, she counted 79 Victory Gardens trucks on Pickertown and Folly Roads between 6 a.m. and 5:08 p.m. *Decision, F.F. 183; Exhibit P-62; N.T. at 1006.* Michael Butler, Victory Gardens' owner and president, also testified to the heavy volume of truck traffic generated by his mulching operation. Mr. Butler estimated that Victory Gardens has between 40 and 70 truck load trips per day during the busy season of March through July. *Decision, F.F. 91; N.T. at 51.* Elsewhere in his testimony Mr. Butler estimated that approximately 75 trucks enter the property per day during the busy season. *Decision, F.F. 124; N.T. at 343.*

November 22, 2012 and December 19, 2012. *Decision, F.F. 116; Exhibit P-27; N.T. at 267-268.* As of January of 2013, Victory Gardens was in violation of six sections of the Fire Code having, among other things, failed to obtain permits for the storage of mulch and exceeding the allowable height limit for the mulch piles. *Decision, F.F. 118; N.T. at 271-273.* On March 11, 2014, the Township Fire Marshall notified Victory Gardens that it was still in violation of the Fire Code. *Decision, F.F. 120; Exhibit P-30; N.T. at 289-290.*

On March 9, 2015, the Warrington Township Zoning Officer (the "Zoning Officer") issued a Notice of Violation to Victory Gardens and to the Property Owner advising them that the mulching operation being conducted by Victory Gardens on the Leased Property is an industrial use and is therefore not permitted in an RA Residential Agricultural Zoning District under the Zoning Ordinance.[3] *Decision, F.F. 16.* On April 7, 2015, Victory Gardens filed an appeal to the Zoning Hearing Board. The Zoning Hearing Board conducted fifteen hearings between May 20, 2015, and January 30, 2017. Several of the adjacent residential property owners were granted party status before the Zoning Hearing Board. *Decision, Background 4.* On May 11, 2017, two members of the Zoning Hearing Board voted to deny the appeal; two members voted to grant the appeal. On May 12, 2017, a written decision was issued which included the findings of fact and conclusions of law as found by the two members of the Zoning Hearing Board who voted to deny Victory Gardens' request for relief and the findings of fact as found by the two members of the Zoning Hearing Board who voted to grant Victory Gardens' request for relief.

On June 9, 2017, Victory Gardens filed a Notice of Land Use Appeal challenging the decision of the Zoning Hearing Board. On June 16, 2017, the Property Owner filed a Notice of Intervention in support of the Land Use Appeal pursuant to Section 1004-A of the Pennsylvania

[3] A notice of violation had previously been issued on August, 15, 2013 but was later withdrawn due to a procedural defect. *Decision, Background 15.*

Municipalities Planning Code ("MPC"), 53 P.S. § 11004-A. On June 28, 2017, the property owners who were granted party status before the Zoning Hearing Board filed a Petition to Intervene as parties pursuant to Section 1004-A of the MPC, 53 P.S. § 11004-A and Rule 2327(4) of the Pennsylvania Rules of Civil Procedure. By Order dated October 19, 2017, the Petition to Intervene was granted.

Scope of Review

Section 1005-A of the MPC governs the standard of review in a land use appeal. That section provides, in part:

> *If the record below includes findings of fact made by the* governing body, *board* or agency *whose decision or action is brought up for review and the court does not take additional evidence* or appoint a referee to take additional evidence, *the findings of the* governing body, *board* or agency *shall not be disturbed by the court if supported by substantial evidence.*

53 P.S. § 11005-A (emphasis added). Victory Gardens[4] argues that because the Zoning Hearing Board issued two sets of findings of fact, one in support of granting relief and one in support of denying relief, there are no "conclusive findings" by "the board." Victory Gardens concludes that this Court is therefore bound by the last sentence in Section 1005-A which provides:

> *If the record does not include findings of fact* or if additional evidence is taken by the court or by a referee, *the court shall make its own findings of fact based on the record below* as supplemented by the additional evidence, if any.

Id. (emphasis added). Based on this provision, Victory Gardens asserts that the review is *de novo* and that this Court is required to "enter its own independent finding of fact" to resolve the Land

[4] The Property Owner did not file a brief, choosing instead to join in and fully adopt as its own statement of position the arguments advanced by Victory Gardens as set forth in its Brief in Support of the Land Use Appeal. Intervenor's Memorandum of Law in Support of Appellant's Land Use Appeal.

Use Appeal. *Appellant's Brief in Support of Land Use Appeal ("Appellant's Brief"), at 11-12.* This Court rejected Victory Gardens' statutory interpretation for the following reasons.[5]

It is well established that a tie vote by a governmental body constitutes a decision to deny relief. See Lamar Advantage GP Co. v. Zoning Hearing Board of Adjustment of City of Pittsburgh, 997 A.2d 423, 432–35 (Pa.Cmwlth. 2010); Kuszyk v. Zoning Hearing Board of Amity Township, 834 A.2d 661, 665 (Pa.Cmwlth. 2003); Danwell Corp. v. Zoning Hearing Board of Plymouth Township, 540 A.2d 588 (Pa.Cmwlth. 1988). There is therefore no question, as Victory Gardens concedes, that the tie vote before the Zoning Hearing Board constituted a denial of Victory Gardens' requests for relief. *Appellant's Brief, at 11.* Under the clear terms of the statute, the scope of review turns on whether the "decision or action" under review includes findings of fact. Here, the decision brought up for review is the decision to deny relief. That decision includes findings of fact. Therefore, this Court's scope of review is limited to a determination as to whether those findings are supported by substantial evidence.

This reading of Section 1005-A is consistent with case law interpreting Section 908(9) of the MPC. Section 908(9) requires a zoning hearing board to render a written decision. 53 P.S. § 10908(9). Under the holding of Danwell, where there is a tie vote on a zoning hearing board, the decision to deny the request for relief constitutes the decision of the board required by Section 908(9) of the MPC. The Danwell court stated,

> the denial decision rendered by the board, *including its findings of facts* and conclusions of law, constituted the decision required by section 908(9) of the MPC. *The trial judge acted correctly in limiting his review of the board's decision to a determination of whether the board abused its discretion or committed an error of law.*

[5] Oral argument as to this issue was held on February 27, 2018. Victory Gardens' request for *de novo* review was denied by order dated April 18, 2018.

Id. at 591 (emphasis added).

Victory Gardens argues that Danwell is distinguishable because Danwell involved only one set of finding of fact whereas here two sets of findings of fact were issued. This argument is not persuasive. The fact that the Zoning Hearing Board members who would have granted relief issued separate findings of fact, does not alter the conclusion that "the denial decision rendered by the board, *including its findings of facts* and conclusions of law, constituted the decision required by section 908(9) of the MPC." Danwell, 540 A.2d at 591 (emphasis added).

This Court's review is therefore limited to determining whether the Zoning Hearing Board committed a manifest abuse of discretion or an error of law in denying the instant variances. Valley View Civic Ass'n v. Zoning Board of Adjustment, 462 A.2d 637, 639 (Pa. 1983) (citations omitted); Pequea Township v. Zoning Hearing Board of Pequea Township, 180 A.3d 500, 504 (Pa.Cmwlth. 2018). A reviewing court may only find that a zoning hearing board abused its discretion if the board's findings are not supported by substantial evidence. "Substantial evidence" is defined as relevant evidence a reasonable mind might accept as adequate to support a conclusion. Valley View Civic Ass'n, 462 A.2d at 640; Pequea Township, 180 A.3d at 504.

Findings of Fact

Victory Gardens challenges Zoning Hearing Board's findings of fact by citing to evidence which contradicts those findings. *Appellant's Objections to Findings of the Board.* It is, however, the function of the Zoning Hearing Board to weigh the evidence before it. Pietropaolo v. Zoning Hearing Board of Lower Merion Township, 979 A.2d 969, 976 (Pa.Cmwlth. 2009). The Zoning Hearing Board is the sole judge of the credibility of witnesses and the weight afforded their testimony. Id. Assuming the record contains substantial evidence, a reviewing court is bound by the Zoning Hearing Board's findings that result from resolutions of credibility and conflicting

testimony and may not substitute its interpretation of the evidence for that of the Zoning Hearing Board. Id. This Court has reviewed the Zoning Hearing Board's findings of fact and finds that they are supported by evidence a reasonable mind might accept as adequate to support a conclusion.

Victory Gardens also asserts that the Zoning Hearing Board's reliance on the testimony of the local residents regarding the adverse impact Victory Gardens' operation is having on the surrounding community was improper because the testimony constitutes the "opinion" of the local residents "who are biased" and who are not "third party professionals." *Appellant's Objections to Findings of the Board, ¶¶ 12-20.* The mere fact that the local residents are lay witnesses does not, however, make their testimony less valuable than the expert evidence proffered by Victory Gardens. In re Jones, 29 A.3d 60, 64 (Pa.Cmwlth. 2011). Their testimony was based on first-hand observation and experience regarding traffic patterns, traffic hazards, air pollution and noise pollution caused by Victory Gardens' operation. Their testimony regarding the detrimental affect those byproducts were having on the health and welfare of the community and the use and enjoyment of their property was, therefore, properly considered by the Zoning Hearing Board.

Permitted Uses within an RA Residential Agricultural District

Victory Gardens' Leased Property is zoned RA Residential Agricultural. *Decision, Background 3.* Subject to various conditions and standards, the following uses are permitted as "a use by right" within an RA Residential Agricultural District pursuant to Section 402 of the Zoning Ordinance:

> A. Agricultural uses, including the keeping of livestock on lots of three acres or more. Agricultural uses include the growing of nursery stock and tilling of the soil shall be limited to one head of livestock, or 10 fowl per 40,000 square feet of lot area. Any building or area used for the keeping or raising of livestock or

fowl shall be situated not less than 100 feet from any street line, property line or dwelling other that the owner's dwelling.

B. Greenhouse as principal or an accessory use to any permitted or conditional use within this district;...

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C. Municipal use.

D. Agricultural sales/roadside stands for the seasonal sale of farm or nursery products produced on the premises; provided:

(1) Only farm produce or nursery material may be sold.

(2) Farm produce and nursery material shall be limited to crops harvested from plants and plant material.

(3) At least 50% of the produce or plant material must be grown or raised on the premises or in the immediate region.

(4) Access/exit to the tract must be controlled by two points. Access/exit points shall be no more than 24 feet wide.

(5) Sales building or stands shall be setback a minimum of 50 feet from the ultimate right-of-way.

(6) Parking. No less than one off-street parking space for each 200 square feet of building floor area or a minimum of four spaces, whichever is greater. All parking shall be behind the legal right-of-way.

E. Kennel. The keeping of more than six dogs that are more than six months old for breeding, training, selling or boarding for a fee is permitted,...

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F. Riding Academy, Riding academy, livery or boarding stable,...

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G. Nursery. The outdoor raising of plants, shrubs and trees for sale and transplantation. Such material may be field grown or grown within a greenhouse,...

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H. Single-family detached dwelling...

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I. No-impact home occupation.

Victory Gardens argues that its mulching operation is a permitted "agricultural use" under Section 402A of the Zoning Ordinance and an "agricultural sales use" under Section 402D of the Zoning Ordinance. *Appellant's Brief, at 22-23.*

There is no dispute that the specified uses set forth in paragraph 402(A), i.e. the "keeping of livestock," "growing of nursery stock" and "tilling of soil," are not the only activities that could qualify as an agricultural use. The issue is whether Victory Gardens' mulching operation can be deemed to be "agricultural" for purposes of Section 402A and Section 402D of the Zoning Ordinance. Based on the size and character of Victory Gardens' operation, the Zoning Hearing Board found that Victory Gardens' use constitutes a commercial/industrial operation and is not an agricultural use or an agricultural sales use. *Decision, C.L 1, 9, 13, 14.*

In reviewing the decision of a zoning hearing board, a reviewing court is required to give great weight and deference to a zoning hearing board's interpretation of its own zoning ordinance. Lancaster Township v. Zoning Hearing Board of Lancaster Township, 6 A.3d 1032, 1034 (Pa.Cmwlth. 2010). The Zoning Ordinance at issue does not define the term "agricultural use." Section 1903(a) of the Statutory Construction Act of 1972 provides that when words in a statute are undefined, they must be accorded "their common and approved usage[.]" 1 Pa.C.S. § 1903(a). Moreover, where a term is undefined, definitions in statutes, regulations or the dictionary may be consulted for guidance, although such definitions are not controlling. Commonwealth v. Golden Gate Nat'l Senior Care LLC, 158 A.3d 203, 221 (Pa.Cmwlth. 2017) (quotation marks and citation omitted). In defining agricultural use, the Zoning Hearing Board therefore properly defined the term "agricultural use" in accordance with its "common meaning" by referring to the definition of the term contained in the MPC and in accordance with the relevant case law, specifically Tinicum Township v. Nowicki, 99 A.3d 586 (Pa.Cmwlth 2014), Lower Mount Bethel Township v. Stine,

686 A.2d 426 (Pa.Cmwlth 1996), and Clout, Inc. v. Clinton Cty. Zoning Hearing Board, 657 A.2d 111 (Pa.Cmwlth. 1995) for guidance. *Decision, C.L. 2-13.*

The MPC defines "agricultural operation" as follows:

> **"Agricultural operation,"** an enterprise that is actively engaged in the commercial production and preparation for market of crops, livestock and livestock products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities. The term includes an enterprise that implements changes in production practices and procedures or types of crops, livestock, livestock products or commodities produced consistent with practices and procedures that are normally engaged by farmers or are consistent with technological development within the agricultural industry.

53 P.S. § 10107. In Nowicki, the court addressed the question of whether the landowners' mulching operation qualified as an agricultural operation under the MPC definition. In holding that the mulching operation did not qualify as an agricultural operation under the MPC, the Nowicki court stated,

> Landowners argue that because they take a silvicultural commodity—tree stumps, logs, and branches—and transform them into a more marketable product—mulch—they are engaged in an agricultural activity because they are preparing the silvicultural commodity for market. Following this interpretation to its logical conclusion would permit the transporting of a silvicultural commodity to any property on which that commodity could be transformed into a more marketable product, no matter where the property is located. Neither this Court nor the Supreme Court has accepted such an interpretation of an agricultural operation disconnected from the use of the land that produced the commodity. Instead, we conclude that *in order to qualify as either an agricultural operation or a forestry activity as defined by Section 107 of the MPC and protected by Section 603(f) and 603(h), the use in question must have some connection to or utilization of the land itself for production of trees, livestock or agricultural, agronomic, horticultural, silvicultural, or aquacultural crops or commodities.* We conclude that, under the circumstances of this case, the mulching operation at issue does not qualify as an agricultural operation or forestry activity under the MPC.

Nowicki, 99 A.3d at 591.

The court in Nowicki also addressed the question of whether the landowners' mulching operation qualified as an agricultural operation or forestry activity such that it was protected by the Act commonly known as the "Right to Farm Act," Act of June 10, 1982, P.L. 454, as amended, 3 P.S. §§ 951-957, in conjunction with Section 315(a) of the Agricultural Code, 3 Pa.C.S. § 315(a). In addressing the issue, the court first noted the following statutory definition of "normal agricultural operation" under the Right to Farm Act:

> The activities, practices, equipment and procedures that farmers adopt, use or engage in the production and preparation for market of poultry, livestock and their products and in the production, harvesting and preparation for market or use of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities and is:
>
> (1) not less than ten contiguous acres in area; or
>
> (2) less than ten contiguous acres in area but has an anticipated yearly gross income of at least $10,000.
>
> The term includes new activities, practices, equipment and procedures consistent with technological development within the agricultural industry. Use of equipment shall include machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing and those items of agricultural equipment and machinery defined by the act of December 12, 1994 (P.L. 944, No. 134), known as the Farm Safety and Occupational Health Act. Custom work shall be considered a normal farming practice. 3 P.S. § 952.

Id. at 592-93. The court held that the mulching operation was not a "normal agricultural operation" under the Right to Farm Act because "none of the raw materials from the mulching operation are produced on the Property and none of the resulting mulch is used for the production of livestock, crops, or agricultural commodities on the Property[.]" Id. at 593 (footnote omitted).

In Stine, the court addressed the question of whether the trial court's finding that the Stine's woodchipping business was a commercial, non-agricultural use was supported by the record. The court summarized the findings of the trial court as follows:

> [T]he court found that the Stines created on their property piles of wood chips and stumps several hundred feet long, up to twelve to fifteen feet high, and one hundred feet wide. It found that there appears to be at least 2500 cubic yards of wood chips stored in piles and that the Stines accumulated stumps and wood chips at five times the rate at which they were able to sell them. At least some of the tree stumps were imported from New Jersey.
>
> In addition, the court found that the Stines' woodchipping business, inter alia, entailed the use of heavy semi-trailer trucks, heavy tracked vehicles, front-end loaders and bulldozers. "Large trucks capable of carrying up to twenty-five cubic yards of chips have entered the property routinely since late May of 1993" and "[n]early two dozen heavy trucks move in and out of the subject property daily in connection with the tree stump chipping operation."

Stine, 686 A.2d at 428 (citations omitted). On appeal, the court analyzed the evidence as follows:

> The Stines presented the testimony of Mr. Clayton Stine, Jr. to establish that the woodchipping operations on the property constituted an agricultural use. To the contrary, Mr. Stine testified that he and his son run businesses on the property, that some of the wood chips are sold to Agway, that some of them are sold to New Jersey landscapers and Christmas tree growers and that the trucking of the wood chips, firewood and soil has nothing to do with the agricultural crops on the property. Also, he testified that, although they mix some woodchips with lime and spread the mixture over shaley knobs prior to planting corn, they sell the majority of the chips.
>
> Township Zoning Officer Richard Weaver testified that the Stines' property was located in both agricultural and conservation zoning districts and that, in his opinion, the wood processing constituted an industrial use.
>
> Accordingly, we conclude that the trial court's findings that the Stines' use of their property exceeded any farming use and that they were conducting a commercial woodchipping operation there in contravention of the law is supported by competent, credible

> evidence. Mr. Stine's testimony provides ample support for the trial court's findings in that regard.

Id. at 430 (citations omitted).

In Clout, the court addressed the question of whether a proposed composting operation constituted an agricultural use under the Clinton County zoning ordinance which permitted "[a]gricultural uses related to the tilling of the land, the raising of farm products, the raising and keeping of horses, cattle and other livestock, and the raising of poultry products" on the property in question. Clout, 657 A.2d at 113. The proposed composting production facility was described as follows:

> [It] will house twelve "composting" bays, each of which are six feet wide, six feet deep and of unknown length. It will be totally enclosed and nothing to do with the process will be conducted outdoors or will come in direct contact with land or soil. About 120 tons of materials to be used in the compost production will be hauled in by truck on a daily basis. The materials to be trucked in will be leaves, yard waste, Christmas trees, brush, pallets, "commercial organics" (food processing wastes), "municipal bio-solids" (treated human sewage sludge), chicken manure, apple pumice and canning industry waste. All of the materials to be used to produce the compost will be brought in from off site and all of the manufactured product will be shipped off site for use elsewhere. The production process is described by the appellant as a high technology in vessel system, and the proposed facility as a "compost production factory" in an "environmental industry".

Id. On appeal, the court held that the proposed composting facility was not a permitted use within the agricultural district under Section 501.1 of the ordinance. Id. at 114. In doing so the court stated,

> None of the compost to be made by appellant would be a product of its land and none of the compost would be applied by appellant to fertilize and condition its land. Under the broad interpretation espoused by appellant, a sewage treatment plant selling sewage sludge to farmers would be a permitted use in the agricultural district as an activity related to the tilling of the soil. The manufacturers of pesticides, herbicides and farm tractors are also engaged in activities

> broadly related to farming. But it would be anomalous to classify a factory of the Dupont Corporation engaged in the manufacture of a pesticide or a factory of International Harvester producing farm tractors as an agricultural rather than an industrial use under the terms of this ordinance.

Id.

In interpreting the Zoning Ordinance, the Zoning Hearing Board recognized that the fundamental nature of agriculture involves the production of crops and livestock and related commodities relating to the use of the land itself. This definition of the term is consistent with the common and approved usage of the term which is defined as "the science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products." Merriam–Webster's Online Dictionary, http://www.merriam-webster.com/agriculture (updated August 13, 2018). In accordance with that fundamental definition, the law requires that the use in question "have some connection to or utilization of the land itself for production of trees, livestock or agricultural, agronomic, horticultural, silvicultural, or aquacultural crops or commodities" before the use can be considered an agricultural use. Nowicki, 99 A.3d at 591. Where none of the raw materials involved in the use are produced on the property and none of the resulting product is used for the production of livestock, crops, or agricultural commodities on the property, the use is not agricultural. Nowicki, 99 A.3d at 593; Clout, 657 A.2d at 114. In distinguishing between agricultural use and commercial and/or industrial use, in addition to considering whether the operation has anything to do with agricultural crops on the property, the courts have also considered the overall operations of the use involved including the where the raw materials for the operation are obtained, where the resulting product is distributed, how those materials are brought to and removed from the site, and how the property itself is utilized. See, Nowicki, supra; Stine, supra; Clout supra.

Here, there was substantial evidence to support the Zoning Hearing Board's findings with regard to the nature and scope of Victory Gardens' mulching operation, specifically with regard to its determination that Victory Gardens' operation involves hauling of large quantities of raw material from off-site locations for processing on the Leased Property and for sale off-site requiring "numerous truck trips per day for the mere transportation of raw and finished product." *Decision, C.L. 11.* The Zoning Hearing Board had sufficient basis to conclude, as a matter fact and law, that the mulching operation being conducted by Victory Gardens on the Leased Premises is not an agricultural use. Like the operations in Nowicki, Stine and Clout, Victory Gardens' use of the Leased Property "lacks any connection to or utilization of the land itself by [Victory Gardens] to obtain the mulch or for use of the mulch following production." *Decision, C.L. 12, 13.* Victory Gardens' argument that their mulch manufacturing operation should be deemed to be an agricultural use because it is being conducted on a farm is not persuasive since there is no operational relationship between Victory Gardens and Winding Brook Farm.[6]

The Zoning Hearing Board also properly rejected Victory Gardens' argument that their mulch manufacturing operation qualifies as an "agricultural sales use." In order to qualify as an "agricultural sales use," the use must not only be agricultural, the use must entail "the seasonal sale of farm or nursery products produced on the premises." Victory Gardens' mulch is neither a farm product nor a nursery product. Nor does the operation involve seasonal sales.

Because there is no discernable abuse of discretion or error of law, the decision of the Zoning Hearing Board that Victory Garden's use of the property is not a permitted use by right under Section 402 of the Zoning Ordinance must be upheld.

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[6] Charles L. Guttenplan, Victory Gardens' land planning expert, offered an opinion that Victory Gardens' mulching operation was an agricultural use. As a basis for his opinion, Mr. Guttenplan testified, "Clearly, what is being done [on the Leased Premises] is part of a larger farm which clearly is an agricultural use." *N.T. at 742.*

Nonconforming Use/Expansion of Nonconforming Use

Victory Gardens argues that because the Property Owner has been mulching on Winding Brook Farm since the 1970's, prior to the implementation of the Zoning Ordinance, Victory Gardens is entitled to use the portion of the property it leases to operate its mulching operation as a continuance of a legal nonconforming use. *Appellant's Brief, at 26-27.*

A "nonconforming use" is one which does not comply with present zoning provisions but which existed lawfully and was created in good faith prior to enactment of the zoning provision. Camaron Apartments, Inc. v. Zoning Board of Adjustment of City of Philadelphia, 324 A.2d 805, 807 (Pa.Cmwlth. 1974). A prior nonconforming use is established where "objective evidence [shows] that the land was devoted to such use at the time the ordinance was enacted." Heyman v. Zoning Hearing Board of Abington Township, 601 A.2d 414, 416 (Pa.Cmwlth. 1991). Further, "[t]he burden of proving the extent or existence of a nonconforming use rests on the property owner who would claim the benefit of the rights accorded property with that status." Id. Specifically, the property owner must prove the existence of a nonconforming use, which requires "conclusive proof by way of objective evidence of the precise extent, nature, time of creation and continuation of the alleged nonconforming use." Jones v. North Huntingdon Township Zoning Hearing Board, 467 A.2d 1206, 1207 (Pa.Cmwlth. 1983).

The right to continue a legal nonconforming use is constitutionally protected. Smalley v. Zoning Hearing Board of Middletown Township, 834 A.2d 535, 539 (Pa. 2003). However, "nonconforming uses are not favorites of the law, and the use or change in use permitted by an ordinance providing for the continuation of nonconforming uses will be strictly construed." Lawrence v. Zoning Hearing Board of Lower Gwynedd Township, 338 A.2d 779, 780–81

(Pa.Cmwlth. 1975). The reason for strict construction was explained in Hanna v. Board of Adjustment, 183 A.2d 539, 543-44 (Pa. 1962) wherein the Supreme Court stated,

> A basic purpose of zoning is to ensure an orderly physical development of the city, borough, township or other community by confining particular uses of property to certain defined areas. With such a purpose nonconforming uses are inconsistent. The continuance of nonconforming uses under zoning ordinances is countenanced because it avoids the imposition of a hardship upon the property owner and because the refusal of the continuance of a nonconforming use would be of doubtful constitutionality. Even though zoning ordinances permit the continuance of nonconforming uses, it is the policy of the law to closely restrict such nonconforming uses and to strictly construe provisions in zoning ordinances which provide for the continuance of nonconforming uses. Nonconforming uses, inconsistent with a basic purpose of zoning, represent conditions which should be reduced to conformity as speedily as is compatible with the law and the Constitution. The fact that a new contemplated nonconforming use of the property is no more detrimental or less objectionable than the existing use is of no consequence.

Id. at 543.

While a legal nonconforming use may continue, it may not be changed or expanded. Hempfield Township v. Hapchuk, 620 A.2d 668, 671 (Pa.Cmwlth. 1993). As the Supreme Court explained in Hanna,

> The use of the property which the ordinance protects, or "freezes", is the use which was in existence at the time of the passage of the ordinance or the change of a use district but it offers no protection to a use *different* from the use in existence when the ordinance was passed. The latter does not render the ordinance invalid. The nonconforming use which is within the orbit of protection of the law and the Constitution is the nonconforming use which exists at the time of the passage of the zoning ordinance or the change in a use district under a zoning ordinance, not a *new* or *different* nonconforming use.

Hanna, 183 A.2d at 543-44 (emphasis in original) (internal citation omitted).

In addition to continuing a lawful nonconforming use, "a property owner has a constitutional right to expand a lawful nonconforming use to meet natural business expansion *so long as the health, safety, and welfare of the community is not jeopardized.*" Kelly Township v. Zoning Hearing Board of Kelly Township, 388 A.2d 347, 349 (Pa.Cmwlth. 1978) (emphasis added). "[A]ny expansion must be reasonable, it must not lead to the creation of a new nonconforming use, it must only be that which is absolutely necessary, and it must not be inconsistent with the public interest." Id.

In rejecting Victory Gardens' claim that it is entitled to use the leased property to operate its mulching operation as a continuance of a legal nonconforming use, the Zoning Hearing Board found that Victory Gardens' mulching operation is not a continuation of a legal nonconforming use but rather is "a new and separate use on the property." *Decision, C.L. 17-20.*

The only direct evidence regarding the nature and extent of the mulching done on Winding Brook Farm was the testimony of Lori Meyers, one of the managers of the farm. Ms. Meyers testified that Winding Brook Farm has been operating since 1805. The farm, in addition to being a dairy farm, also produces crops, including corn, soybeans and rye. Mulch has been produced on the farm since the 1970's. It is made from locally obtained raw materials. Although some of the mulch is sold to local customers, the mulch is also used on the farm. Ms. Meyers estimated total sales to be approximately $6,000.00 per year. *Decision, F.F. 276, 277; N.T. at 1522-29.* Mulch is still being produced, used and sold on the farm. *Decision, F.F. 277; N.T. at 1523, 1525.*

As previously stated, the nature and extent of the mulching operation being conducted by Victory Gardens on the Leased Property has changed substantially since operations began in 1999. At the outset, Victory Gardens leased only two acres and maintained only one pile of mulch on the property estimated to be six or seven feet in height. Victory Gardens' operation now encompasses

over eleven acres and maintains eight to ten piles of mulch on the property estimated at different times to be 150 feet wide, 250 feet long and at times between 60 and 70 feet high. Victory Gardens processes approximately 125,000 yards of mulch at the Leased Property each year.

Assuming Winding Brook Farm's mulch production is a nonconforming use,[7] the Zoning Hearing Board's finding that Victory Garden's operation is not "a mere continuation or expansion" of the mulching being done on the farm but rather is a "completely separate use" is supported by substantial evidence. Victory Gardens has not taken over the mulching operations being conducted by the Property Owners. The Property Owners continue to make, use and sell mulch on the Property. As the Zoning Hearing Board noted, Victory Gardens "is a completely separate operation" that has "its own employees, its own trucks, its own equipment, its own customers and its own revenues." *Decision, C.L. 18.*

Moreover, the Zoning Hearing Board did not abuse its discretion or commit an error of law in finding that Victory Gardens' use represents such a change in volume and degree so as to represent a change in use. In Kelly Township v. Zoning Hearing Board of Kelly Township, 388 A.2d 347, 349 (Pa.Cmwlth. 1978), the Court held that installation of a machine that would allow appellants to increase the processing of motor vehicle for scrap from 50 motor vehicles per week to at least 50 motor vehicles per day constituted an unlawful expansion of an existing nonconforming use stating, "(t)his then represents, not only a difference in degree of production,

[7] In the instant case, the Zoning Hearing Board did not address whether Victory Gardens and/or the Property Owner met their burden of proof with regard to establishing the existence of a nonconforming use by Winding Brook Farm. It appears, however, that there is no "conclusive proof by way of objective evidence of the precise extent, nature, time of creation and continuation of the alleged nonconforming use." Jones v. North Huntingdon Township Zoning Hearing Board, 467 A.2d 1206, 1207 (Pa.Cmwlth. 1983). The record does not establish that the mulch produced on the Property Owner's 216 acre farm is or ever was a non-agricultural and/or non-agricultural sales use. Given the limited extent of the farms mulch production and the fact that the mulch was utilized in its farming operations, it appears that the mulch produced by the owners of Winding Brook Farms was part of the Property Owners' agricultural use of the land and may therefore constitute an agricultural and/or agricultural sales use. See Nowicki, supra; Clout, supra; Stine, supra.

or use, but a difference in degree so great as to make the process truly one of a difference in kind of use." Id. at 349 (quotation marks omitted) (citation omitted). Similarly, Victory Gardens has increased production to such an extent as to make the process a different use.

Finally, Victory Gardens did not meet their burden of establishing that their expanded use was not a detriment to the community.[8] In Kelly Township, 388 A.2d at 349 (Pa.Cmwlth. 1978), the court held that appellants therein failed to demonstrate the proposed machine to be used in scrapping operations was not a detriment to the community, stating, "[t]he machine itself creates noise and dust." Id. In the instant case, the Zoning Hearing Board properly accepted the testimony of experts and area residents regarding the adverse impacts the mulching operation is having on their community, including noise pollution, reduced air quality, traffic hazards, and fire hazards all of which has had a substantial negative impact on the health and welfare of surrounding property owners and their use and enjoyment of their property. *Decision, C.L. 43-72, 102, 103.*

Use variance

Victory Gardens argues that it is entitled to a use variance. The Municipalities Planning Code provides that a zoning board may only grant a variance where it finds the applicant has established *all* of the following conditions:

> (1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property and that the unnecessary hardship is due to such conditions and not the circumstances or conditions generally created by the provisions of the zoning ordinance in the neighborhood or district in which the property is located.

[8] Although this issue was not addressed by the Zoning Hearing Board with regard to Victory Gardens' claim of continuation of a nonconforming use, the Zoning Hearing Board did find that Victory Gardens failed to establish that its operation did not pose a threat to the public health when it addressed Victory Gardens' claim that it was entitled to a variance by estoppel. *Decision, C.L. 43.* The Zoning Hearing Board also concluded that the operation poses a threat to the health, safety and welfare of nearby residents. *Decision, C.L. 102.*

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of the zoning ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property.

(3) That such unnecessary hardship has not been created by the appellant [applicant].

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare.

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation in issue.

53 P.S. § 10910.2.[9]

The required unnecessary hardship must attend the property. Yeager v. Zoning Hearing Board of the City of Allentown, 779 A.2d 595, 598 (Pa.Cmwlth. 2001). "[A] variance cannot provide relief where a hardship afflicts the property holder's desired use of the land and not the land itself." Id. In other words, a variance, whether labeled dimensional or use, is appropriate only where the *property,* not the person, is subject to hardship. Id. (quotation marks and citation omitted) (emphasis in original). A variance will not be granted because a zoning ordinance "deprives the landowner of the most lucrative and profitable uses." Wilson v. Plumstead Township Zoning Hearing Board, 936 A.2d 1061, 1070 (Pa. 2007) (citation omitted). To establish an unnecessary hardship, the evidence must demonstrate that:

> (a) the physical conditions of the property are such that it cannot be used for a permitted purpose; or (b) the property can be conformed for a permitted use only at a prohibitive expense; or (c) the property is valueless for any purpose permitted by the zoning ordinance.

[9] Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §§ 10101–11202. Sections 910.2, added by the Act of December 21, 1988, P.L. 1329, No. 170 § 89.

Nowicki v. Zoning Hearing Board of Borough of Monaca, 91 A.3d 287, 292 (Pa.Cmwlth. 2014) (citation omitted). Although zoning ordinances are to be liberally construed to allow for the broadest possible use of the land, an applicant seeking a variance bears a heavy burden. Id. at 291. The reasons for granting a variance must be substantial, serious, and compelling. Oxford Corp. v. Zoning Hearing Board of Borough of Oxford, 34 A.3d 286, 296 (Pa.Cmwlth. 2011).

In the instant case, the Board did not abuse its discretion or commit an error of law in finding that Victory Gardens is not entitled to a variance. Victory Gardens failed to establish that an unnecessary hardship attends the land and that a variance is necessary to enable the reasonable use of the Leased Property. *See Decision, C.L. 39-42, 76, 96-99.* There is no evidence that there are any physical circumstances or conditions peculiar to the property. The only evidence of hardship relates solely to economic considerations unique to Victory Gardens' business. However, a variance is only appropriate where the *property,* not the person, or in this case, the business, is subject to hardship. Yeager, 779 A.2d at 598. A variance will not be granted because a zoning ordinance "deprives the landowner of the most lucrative and profitable uses." Wilson, 936 A.2d at 1061. There is nothing preventing the Leased Property from being used for agricultural purposes or for any of the other purposes that are permitted under the Zoning Ordinance. Since there are no permanent structures on the property and no other physical conditions that would prevent the property being used for a permitted purpose, there is no evidence to support the conclusion that the Leased Property cannot be conformed for a permitted use without prohibitive expense.

Victory Gardens also failed to establish that its industrial mulching operation will "not alter the essential character of the neighborhood," or "substantially or permanently impair the appropriate use or development of adjacent property" or "be detrimental to the public welfare." 53 P.S. § 10910.2(a)(4). *See Decision, C.L. 44-72, 77-85.* The record in the instant case is replete

with testimony regarding the adverse impacts the mulching operation is having on the surrounding residential community. As noted above, the Zoning Hearing Board properly accepted the testimony of experts and area residents regarding the noise pollution, reduced air quality, traffic hazards, and fire hazards created by Victory Gardens' industrial mulching operation.

Equitable Relief

A property owner may seek equitable relief in zoning cases to estop municipal enforcement of a land use regulation. In re Kreider, 808 A.2d 340, 343 (Pa.Cmwlth. 2002). In the instant case, Victory Gardens sought to prevent Warrington Township from enforcing its Zoning Ordinance under all the three theories of estoppel, *i.e.* vested right, equitable estoppel and variance by estoppel. Estoppel under each of these theories is "an unusual remedy granted only in extraordinary circumstances and the landowner bears the burden of proving his entitlement to relief." Id. The party asserting equitable estoppel has the burden to establish such estoppel by clear, precise and unequivocal evidence. See Baker v. Upper Southampton Township Zoning Hearing Board, 830 A.2d 600, 604 (Pa.Cmwlth. 2003); Springfield Township v. Kim, 792 A.2d 717 (Pa.Cmwlth. 2002).

Vested Right

Victory Gardens asserts that it has a vested right to continue its mulching operations. A landowner who is asserting a vested right must present evidence that the municipal action which induced his reliance was the issuance of a permit. Petrosky v. Zoning Hearing Board of the Township of Upper Chichester, 485 Pa. 501, 506, 402 A.2d 1385, 1388 (1979). The doctrine of vested rights was fashioned to accomplish fairness when a landowner has relied upon a zoning permit issued by a municipality and the permit is subsequently determined to be invalid. Rudolph v. Zoning Hearing Board of Cambria Township, 839 A.2d 475, 478 (Pa.Cmwlth. 2003) (citation

omitted). Here, there is no dispute that Victory Gardens never applied for or received a permit. The vested rights doctrine is therefore not applicable in the instant case.

Victory Gardens argues that the "Memorandum of Understanding" written by counsel for Victory Gardens and approved by the Board of Supervisors in 2012 "constituted the issuance of a permit." *Appellant's Brief, at 20.* Specifically, Victory Gardens asserts that the Memorandum of Understanding "serves as a 'permit' issued by the Township, because it reaffirmed [Victory Gardens'] rights, initially acquired in 1999, to continue to operate at the [Leased Property]." *Appellant's Brief, at 22.* Contrary to Victory Gardens' assertion, the Memorandum of Understanding and the minutes of the meeting during which the Board of Supervisors approved the Memorandum of Understanding do not authorize or affirm Victory Gardens' use of the property. The approved Memorandum of Understanding merely constituted an attempt by the Board of Supervisors to address citizen complaints regarding traffic safety issues that arose as a result of Victory Gardens' use of the Leased Property and therefore cannot fairly be deemed the equivalent of a zoning use and occupancy permit. *See Appellant's Brief, Exhibit A and B; Exhibits A-18, A-17B* .

Other factors to be considered in determining whether a vested right has been established are: (1) the landowner's due diligence in attempting to comply with the law; (2) the landowner's good faith throughout the proceedings; (3) the landowner's expenditure of substantial unrecoverable funds; (4) the expiration without appeal of the period during which an appeal could have been taken from the issuance of a permit; and (5) the insufficiency of the evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of a permit. Petrosky, 402 A.2d at 1388.

The Zoning Hearing Board found that Victory Gardens did not act in good faith citing numerous instances of Victory Gardens' failure to abide by the terms of the Memorandum of Understanding and act in accordance with other representations it made regarding its operations. *Decision, C.L. 28-38.* The Zoning Hearing Board's finding in this regard are supported by substantial evidence.

The Zoning Hearing Board also found that there was sufficient evidence to establish that Victory Gardens' operation adversely affected the property rights of the neighboring residents and the health, safety and welfare of the community. *Decision, C.L. 28, 43-72, 101-103.* As explained above, the Zoning Hearing Board's finding with regard to noise pollution, reduced air quality, traffic hazards, fire hazards and other adverse effects upon the community are supported by substantial evidence.

The record also establishes that Victory Gardens did not exercise due diligence in attempting to comply with the law. The only evidence with regard to Victory Gardens' effort to determine whether a use and occupancy permit was required is the testimony of Michael Butler, owner and President of Victory Gardens. Mr. Butler testified that in 1999, he went to the Township building and asked to speak to the Zoning Officer. When the gentleman who then held that position "came to the counter," Mr. Butler told him "I would like to lease ground in Warrington to make mulch" and inquired, "Where can I go to make mulch in Warrington Township?" The Zoning Officer responded, "Son, there will only be two places where you will be permitted to make mulch. That is Winding Brook Farm and Schmucker Farm. They are currently doing it now." He was also advised that he would not need a permit because "it's an agricultural use and the farm is an agricultural farm at Winding Brook Farm and so is Schmucker Farm." *N.T. at 25-26.* This casual inquiry as to potential sites to "make mulch" without any discussion as to the nature and extent of

the intended use does not constitute a diligent and/or good faith effort to comply with Warrington Township's Zoning Ordinance.

Equitable Estoppel

Victory Gardens asserts that Warrington Township is precluded from enforcing its land use regulations based on the doctrine of equitable estoppel. The doctrine of equitable estoppel will be applied where: (1) there is an intentional or negligent misrepresentation of some material fact, (2) which was made with knowledge or reason to know that the other party would rely upon it, and (3) which induced the other party to act to his or her detriment because of justifiable reliance upon the misrepresentation. Strunk v. Zoning Hearing Board of Upper Milford Township, 684 A.2d 682, 685 (Pa.Cmwlth. 1996). Application of the doctrine of equitable estoppel requires good faith action on the part of the party asserting estoppel. Vaughn v. Zoning Hearing Board of Township of Shaler, 947 A.2d 218, 225 (Pa.Cmwlth. 2008); In re Kreider, 808 A.2d 340, 343 (Pa.Cmwlth. 2002). Victory Gardens failed to meet its burden of proof as to all of the elements of equitable estoppel.

Victory Gardens' reliance on the testimony of Mr. Butler regarding his 1999 conversation with the Zoning Officer about locations available to make mulch and the need for a permit to do so to establish an intentional or negligent misrepresentation of a material fact is misplaced. The Zoning Officer's statements do not constitute a misrepresentation of fact, intentional or otherwise. Mulching in connection with farming operations is a permitted agricultural use in the RA Residential Agricultural District wherein the Leased Property is located. There is no evidence of record that the Zoning Officer advised Mr. Butler that he could conduct mulching operations on an industrial scale, independent of the farms.

Nor can the Zoning Officer be deemed to have made his statements with "knowledge or reason to know that the other party would rely upon it." Mr. Butler appeared to be making a casual inquiry as to potential sites. The Zoning Officer would have no basis to conclude that this type of casual inquiry would be relied upon as the functional equivalent of an official permit. The lack of any discussion as to any specifics regarding the nature and extent of the intended use precludes any such finding.

For the same reasons, Mr. Butler was not justified in relying upon the Zoning Officer's statements. Even if Mr. Butler is deemed to have been justified in relying on the Zoning Officer's statements as approving his initial small mulching operation, he was not justified in interpreting those statements as giving him unlimited permission to operate and expand any type of mulching operation he chose especially considering the nature of the zoning district, its permitted uses as described in the Zoning Ordinance and the limited nature of the mulching being done on Winding Brook Farm in conjunction with their farming operations.

Victory Gardens has also failed to establish that it acted to its economic detriment as a result of its reliance on the Zoning Officer's statements in 1999 or the conduct of the Township thereafter. Victory Gardens expenditure of "hundreds of thousands of dollars" to operate the mulching operation and its separate retail operation did not arise out of any issue as to zoning. They are standard business expenses and therefore do not constitute an economic detriment that was induced by any alleged misrepresentation of material fact as to permissible uses under the Township Zoning Ordinance. Victory Gardens' argues that it relied on the Memorandum of Understanding to its economic detriment, expending large amounts of money to address the Township's concerns. Once again, the Memorandum of Understanding, by its terms and by the terms of its adoption by the Board of Supervisors, did not address zoning or authorize Victory

Gardens' industrial use of the property. The Memorandum of Understanding and the discussions between Victory Gardens and the Township leading up to its adoption by the Board of Supervisors were not designed to address zoning issues but rather traffic hazards and other dangerous conditions existing on and near the Leased Property. Expenditures to address health and safety issues do not constitute an economic detriment that was induced by any alleged misrepresentation of material fact as to permissible uses under the Township Zoning Ordinance.

Equitable estoppel is an equitable remedy. A party who seeks relief in equity, must have clean hands. Strunk, 684 A.2d at 685 (stating that the requirement of clean hands is always an integral part of establishing a right to relief in equity). With regard to expenditures made to address health and safety concerns, the Zoning Hearing Board found that Victory Gardens did not act in good faith or with clean hands. Specifically, the Zoning Hearing Board found that Victory Gardens repeatedly violated various Township Codes as well as the Memorandum of Understanding. *Decision, C.L. 29-38.* The Zoning Hearing Board's findings in this regard are supported by substantial evidence.

Variance by Estoppel

Victory Gardens asserts that it is entitled to a variance by estoppel. A variance by estoppel is appropriate when a use does not conform to the zoning ordinance and the property owner establishes all of the following: (1) a long period of municipal failure to enforce the law, when the municipality knew or should have known of the violation, in conjunction with some form of active acquiescence in the illegal use; (2) the landowner acted in good faith and relied innocently upon the validity of the use throughout the proceeding; (3) the landowner has made substantial expenditures in reliance upon his belief that his use was permitted; and (4) denial of the variance would impose an unnecessary hardship on the applicant. Borough of Dormont v. Zoning Hearing

Board of Borough of Dormont, 850 A.2d 826, 828 (Pa.Cmwlth. 2004). A zoning hearing board may also consider whether there is sufficient evidence to show that the use is a threat to the public health, safety or moral. Appeal of Crawford, 531 A.2d 865, 868 (Pa.Cmwlth. 1987). Moreover, a variance by estoppel does not attach where the applicant deviates from that which has been approved by government officials. Steven J., Inc. v. Salisbury Township Zoning Hearing Board, No. 2160 C.D. 2012, 2013 WL 3487078, at *3 (Pa.Cmwlth. July 11, 2013) (citing Randolph Vine Assoc. v. Zoning Board of Adjustment of Philadelphia, 573 A.2d 255, 259 (Pa.Cmwlth. 1990)).

The Zoning Hearing Board found that Victory Gardens did not establish by clear, precise and unequivocal evidence that it acted in good faith and innocently relied on the validity of the use throughout the proceedings. *Decision, C.L. 29-38.* As explained above, the Zoning Hearing Board had substantial evidence upon which to conclude that Victory Gardens did not act in good faith. With regard to the requirement of innocent reliance, the party seeking a variance by estoppel cannot rely on statements of township officials approving the applicant's use of the subject property where the approval is based on vague or insufficient information. Pietropaolo v. Zoning Hearing Board of Lower Merion Township, 979 A.2d 969 (Pa.Cmwlth. 2009). In Pietropaolo, the applicant sought a variance by estoppel to conduct his landscape business based on evidence that he asked a township official if he could "keep his equipment" on the subject property to which the township official responded "yes." Id. at 980. The zoning hearing board found that this testimony was insufficient to constitute clear, precise and unequivocal evidence of innocent reliance on the validity of the applicant's use of the property. Id. at 981–82. On appeal, the court agreed noting that the applicant did not inform the township official that staging, maintenance, and preparation for a landscape business would be conducted on the subject property. Id. Similarly, Mr. Butler's reliance on the Zoning Officer's representation that mulch can be made on Winding Brook Farm

cannot be deemed to constitute innocent reliance on the validity of the applicant's use of the Leased Property to conduct an industrial mulching business on the property.

Moreover, a landowner is "duty-bound" to check the zoning status of a property prior to purchase and if he fails to do so, "he may not advance the resulting ignorance in support of a variance by estoppel." Hafner v. Zoning Hearing Board of Allen Township, 974 A.2d 1204, 1212 (Pa.Cmwlth. 2009). A landowner's "duty to inquire is not limited to whether a particular *use* is permitted but, by implication, must also encompass an inquiry into the limitations placed on the manner in which the property may be used." Springfield Township v. Kim, 792 A.2d 717, 722 (Pa.Cmwlth. 2002) (emphasis in original).

In Hafner, the applicant sought variance by estoppel to permit him to continue operating tool repair and concrete cutting businesses based on evidence that (1) the applicant's father asked a township supervisor about intended use of property before purchasing it and was told it was "no problem;" and (2) that a zoning officer voiced no concerns when the applicant's father subsequently received a building permit to construct a second garage on the property. Hafner, 974 A.2d at 1212. The Court held that the applicant's father's inquiries were not sufficient to establish good faith reliance where the applicant never reviewed the relevant zoning ordinances noting that "had [the] Applicant reviewed the relevant zoning ordinances he would have been aware of significant limitations on his intended commercial use of the property." Id. Here, had Victory Gardens reviewed the relevant zoning ordinance, it would have been aware of the significant limitations regarding agricultural uses and would have learned that the Leased Property was not zoned for his intended commercial use of the property.

To the extent that Victory Gardens could have read the Zoning Ordinance to allow its initial use of the Leased Premises, i.e. the manufacture of small amounts of mulch, it was not entitled to

expand that operation into an industrial use without making further inquiry. Hitz v. Zoning Hearing Board of S. Annville Township, 734 A.2d 60, 66 (Pa.Cmwlth. 1999) (found that landowners did not demonstrate good faith throughout the proceedings where, instead of seeking approval from the Township before expanding their business, the landowners simply expanded). It well established that,

> [o]ne who undertakes to make use of real estate for commercial purposes without inquiring as to whether the use is permitted by the municipality's zoning ordinance, does so at his own peril. The purchaser's duty to inquire is not limited to whether a particular use is permitted but, by implication, *must also encompass an inquiry into the limitations placed on the manner in which the property may be used*[.]

Pietropaolo, 979 A.2d at 981 (emphasis added) (quoting Kim, 792 A.2d at 722).

The Zoning Hearing Board also properly found that Victory Gardens did not establish by clear, precise and unequivocal evidence that the denial of a variance by estoppel would impose an unnecessary hardship as explained above. *Decision, C.L. 28.*

Finally, as explained above, the Zoning Hearing Board properly found that Victory Gardens failed to establish that its mulching operation is not a threat to public health and safety. *Decision, C.L. 43-72.*

Conclusion

After a thorough review of the record below and upon consideration of the arguments presented by the parties, this Court can discern no error in the Zoning Hearing Board's factual findings or its application of controlling law. The Decision of the Zoning Hearing Board must therefore be affirmed.

ORDER

AND NOW, this 30th day of November, 2018, it is hereby **ORDERED, DIRECTED** and **DECREED** that the Decision of the Warrington Township Zoning Hearing Board denying Victory Gardens' requests for relief is **AFFIRMED**. This Court's Memorandum Opinion dated April 18, 2018 is **VACATED**.

BY THE COURT:

Diane E. Gibbons

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